



DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 22-53]

Matthew S. Katz, M.D.; Decision and Order

I. Introduction

On August 16, 2022, the Drug Enforcement Administration (DEA or Government) issued an Order to Show Cause (OSC) to Matthew S. Katz, M.D. (Respondent), of Nashville, Tennessee, the state where Respondent is registered with the DEA.¹ OSC, at 1. The OSC proposes the revocation of Respondent's DEA Certificate of Registration (registration), FK7432278, and the denial of any applications for renewal or modification of it, alleging that Respondent was convicted of a Tennessee felony relating to controlled substances.² *Id.*, citing 21 U.S.C. 824(a)(2).³

The hearing Respondent requested was held on December 20, 2022. Tr. 1. Concluding that Respondent's acceptance of responsibility was short of unequivocal, and that his misconduct was egregious, the Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision of the Administrative Law Judge (RD) recommends that Respondent's registration be revoked. RD, at 22-23. Given the egregiousness of the uncontested facts and the facts based on substantial record evidence, the Agency agrees with the RD that revocation is the appropriate sanction.

Ii. Findings

¹ Effective December 2, 2022, the Medical Marijuana and Cannabidiol Research Expansion Act, Pub. L. No. 117-215, 136 Stat. 2257 (2022) (MRA), amended the Controlled Substances Act (CSA) and other statutes. Relevant to this matter, the MRA redesignated 21 U.S.C. 823(f), cited in the OSC, as 21 U.S.C. 823(g)(1). Accordingly, this Decision cites to the current designation, 21 U.S.C. 823(g)(1), and to the MRA-amended CSA throughout.

² The OSC also seeks denial of "any applications for any other DEA registrations." OSC, at 1.

³ The OSC alleges that Respondent "pled guilty" to the Class D felony, Tenn. Code Ann. section 53-11-402. OSC, at 2. The Government acknowledges that Respondent pled "*nolo contendere*." *See, e.g.*, Government's Prehearing Statement (September 30, 2022), at 2. The parties agree that Respondent's plea is subject to an Order of Deferral. *See, e.g. id.*; Request for Hearing (September 22, 2022), at 1. The parties also agree that the Agency considers Respondent's *nolo contendere* plea to be a "conviction" for purposes of 21 U.S.C. 824(a)(4). Respondent's Post-Hearing Brief (January 20, 2023) (Resp Posthearing), at 13.

A. Background Findings

Having thoroughly analyzed the certified record, the Agency finds substantial record evidence that: (1) Respondent prescribed Schedule II controlled substances without a legitimate medical purpose, (2) Respondent then instructed the patients to bring him the filled prescriptions, and (3) Respondent took most of the controlled substances for his own use after, he testified, making sure that the patient did not need them to relieve pain. Stipulation No. 6; Resp Posthearing, at 13. There is no record evidence that Respondent complied with Tennessee's legal requirements for issuing controlled substances. The Agency finds no record evidence that Respondent took steps to make sure he did not over-prescribe opiates to individuals who were already opioid-addicted, who were addicted to another substance, or who were at a particular risk of becoming opioid-addicted.

B. Undisputed Matters of Fact and Law

The Agency finds, to Respondent's credit, that he advised the Chief Administrative Law Judge and the Government that the Consent Order of the Tennessee Board of Medical Examiners (TMB) restricts him from prescribing Schedule II controlled substances in Tennessee for twelve (12) months beginning on the date of the Consent Order's entry.⁴ TMB Consent Order (entered September 27, 2022), RX 7, at 6, citing Tenn. Comp. R. & Regs. 0880-02-.25 (2019). Indeed, the Agency finds that, according to the Consent Order, Respondent's loss of authority in Tennessee to prescribe Schedule II controlled substances predates the Consent Order. RX 7, at 3 ("Due to the allegations in the indictment . . . , the Respondent lost his authorization to prescribe Schedule II controlled substances in this state until the criminal cases against him reach final disposition."). Accordingly, the Agency finds uncontroverted record evidence that Respondent presently lacks authority in Tennessee to prescribe Schedule II controlled substances.

Additionally, the parties agree to the following factual and legal matters.

⁴ The Consent Order also places Respondent's medical license on probation for three years. RX 7, at 5.

1. Respondent pled *nolo contendere* to three counts of obtaining possession of oxycodone by misrepresentation, fraud, forgery, deception or subterfuge, a Class D Tennessee felony. Tenn. Code Ann. section 53-11-402(a)(3) and (b)(1); *see, e.g.*, OSC, at 2; Stipulation No. 6; Resp Posthearing, at 2, 13.
2. Prior Agency decisions state that a *nolo contendere* plea is a “conviction” for purposes of 21 U.S.C. 824(a)(2). *See, e.g., Erica N. Grant, M.D.*, 86 FR 40641, 40646-48 (2021) (collecting cases); Resp Posthearing, at 13; *but cf.* Transcript of Guilty Plea Proceedings, State of Tennessee v. Matthew S. J. Katz, No. 2021-B-794 (Criminal Court for Davidson County, Tennessee, Division III, June 30, 2022), GX 3b, at 4 (The Court: “So do you understand that this is a special probation, that is . . . you’re not going to be convicted, and it will be removed from your record if you follow the conditions.”).
3. Respondent is not eligible for a Schedule II registration because he lacks authority in Tennessee to dispense Schedule II controlled substances. Resp Posthearing, at 16-17; Government’s Post-Hearing Brief (dated January 20, 2023) (Govt Posthearing), at 10.

III. Discussion

According to the Controlled Substances Act (CSA), the Attorney General “shall register practitioners . . . to dispense . . . controlled substances . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.” 21 U.S.C. 823(g)(1). The CSA defines “practitioner” as a “physician . . . licensed, registered, or otherwise permitted, by the . . . jurisdiction in which he practices . . . , to distribute, dispense . . . [, or] administer . . . a controlled substance in the course of professional practice.” 21 U.S.C. 802(21). The Agency has long interpreted these two CSA provisions to mean that state authority to dispense controlled substances is a prerequisite to the Agency’s issuance of a registration. *See, e.g., Valerie Augustus, M.D.*, 88 FR 1098, 1099 (2023).

Further, the Attorney General is authorized to suspend or revoke a registration “upon a finding that the registrant . . . has been convicted of a felony . . . of any State . . . relating to any substance defined in this subchapter as a controlled substance” 21 U.S.C. 824(a)(2).

The Government has the burden of proof in this proceeding. 21 CFR 1301.44.

Based on undisputed factual and legal matters, the Agency finds conclusive record evidence that: (1) Respondent lacks authority in Tennessee to dispense Schedule II controlled substances, and (2) the Government presented a *prima facie* case that Respondent is a felon convicted of an offense relating to a controlled substance. *Supra* section II.A. Accordingly, the Agency finds that: (1) Respondent is not eligible for a registration to dispense Schedule II controlled substances, and that (2) Respondent’s registration, as to Schedules III through V, is subject to revocation due to his felony conviction relating to controlled substances. 21 U.S.C. 802 (21), 823(g)(1); *see, e.g., Valerie Augustus, M.D.*, 88 FR 1099 (as to Schedule II eligibility); 21 U.S.C. 824(a)(2); *see, e.g., Johnny C. Benjamin, Jr., M.D.*, 86 FR 32280, 32282 (2021) (as to felony conviction).

IV. Sanction

Where, as here, the Government has met its *prima facie* burden of showing that one or more grounds for revocation exists, the burden shifts to the Respondent to show why he can be entrusted with a registration.⁵ *Garrett Howard Smith, M.D.*, 83 FR 18882 (2018). Moreover, as past performance is the best predictor of future performance, the Agency has required that a respondent must unequivocally accept responsibility for the unlawful acts for which he was convicted, and demonstrate that he will not engage in future misconduct.⁶ *Id.* In addition, the

⁵ Respondent describes himself as a “highly trained vitreoretinal surgeon” who “credibly explained” that “he developed an addiction to opioid pain killers” after a back injury that “he attempted to manage himself.” Resp Posthearing, at 3. Although “it felt appropriate to him” at the time to manage himself, “he now acknowledges that behavior sounds ‘crazy’ to him.” *Id.* Respondent’s brief also states that he “candidly acknowledged he engaged in dishonest, inappropriate, and unlawful behaviors in pursuit of substances to sustain the addiction.” *Id.*; *infra*. Respondent was not asked to address his listing of “cocaine” in the “drug(s) of choice” section of the Tennessee Medical Foundation contract. RX 5, at 8.

⁶ Respondent argues that his ability to continue his medical work requires his maintenance of a registration. *See, e.g.,* Resp Posthearing, at 11-12. After carefully reviewing his argument and the bases he posits for it, including RX 4 and RX 6, the Agency finds that the evidence Respondent, himself, offered belies this argument. Indeed, the record includes evidence that Respondent’s skill, commitment to his sobriety, willingness to undergo extensive

Agency has found that the egregiousness and extent of the misconduct are significant factors in determining the appropriate sanction. *Id.* The Agency has also considered the need to deter similar acts by applicants and by the community of registrants. *Id.*

The OSC that initiated this adjudication alleges that the registration of Respondent, who has been convicted of a felony relating to a controlled substance, should be revoked. *Supra* section I. As already discussed, the Agency is without authority to allow Respondent to maintain his registration to dispense Schedule II controlled substances. *Supra* section III. Accordingly, at a minimum, Respondent's authorization to dispense Schedule II controlled substances must now be revoked.

It is the Administrator's CSA-mandated exercise of discretion, however, that determines whether Respondent will continue to hold a registration to dispense Schedules III through V. 21 U.S.C. 824(a). The parties disagree about whether Respondent unequivocally accepted responsibility. *See, e.g.,* Resp Posthearing, at 13-14; Govt Posthearing at 6-9. The certified record in this matter is not sufficiently developed to determine whether Respondent unequivocally accepted responsibility. However, based on the facts in the certified record that are well-developed and undisputed, the Agency concludes that whether Respondent unequivocally accepted responsibility would not impact a finding as to the appropriate sanction given the egregiousness of Respondent's conduct.

In this matter, the Agency found substantial record evidence that, regardless of the resulting harm his patients could suffer, Respondent prescribed controlled substances so that he could divert at least a portion of them to himself. *See, e.g.,* Resp Posthearing, at 4-6, 13-14. These most egregious facts must result in the revocation of Respondent's registration. To allow Respondent to maintain any controlled substance prescribing authority in the face of the

monitoring, and the apparent good will he has engendered have been sufficient for him to obtain and/or retain his current professional employment. *See, e.g.,* Resp Posthearing, at 7-12, 14-15.

The Agency notes that Respondent's argument, even if proven, is irrelevant to whether Respondent may be entrusted with a registration, the salient issue in this adjudication.

egregiousness of the found facts, the danger of his disregard for the CSA, and the safety of his patients would send a message to the current and prospective registrant community that compliance with the CSA is not a condition precedent to the issuance and retention of a registration. *Garrett Howard Smith, M.D.*, 83 FR 18910. Accordingly, the Agency shall order the sanction the Government requested, without restricting Respondent from applying for a registration in the future.

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(g)(1) and 824(a)(2), I hereby revoke DEA Certificate of Registration FK7432278 issued to Matthew S. Katz, M.D. Further, pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(g)(1), I hereby deny any pending application of Matthew S. Katz, M.D., to renew or modify this registration, as well as for any other pending application(s) of Matthew S. Katz, M.D., for registration in Tennessee. This Order is effective ***[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]***.

Signing Authority

This document of the Drug Enforcement Administration was signed on April 10, 2023, by Administrator Anne Milgram. That document with the original signature and date is maintained by DEA. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DEA Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of DEA. This administrative process in no way alters the legal effect of this document upon publication in the *Federal Register*.

Heather Achbach,
Federal Register Liaison Officer,
Drug Enforcement Administration.